

Rojas v Action Constr. Mgt., Inc.

2025 NY Slip Op 31831(U)

May 21, 2025

Supreme Court, New York County

Docket Number: Index No. 154704/2023

Judge: Leticia M. Ramirez

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY**

PRESENT: HON. LETICIA M. RAMIREZ PART 29

Justice

-----X
 LUIS M. TOVAR ROJAS, INDEX NO. 154704/2023
 Plaintiff, MOTION DATE 02/25/2025
 - v - MOTION SEQ. NO. 002

ACTION CONSTRUCTION MANAGEMENT, INC. and 42ND
 & 8TH HOLDCO LLC,
 Defendants.

**DECISION + ORDER ON
 MOTION**

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 The following e-filed documents, listed by NYSCEF document number (Motion 002) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80
 were read on this motion to/for DISMISS LACK OF PROSECUTION.

Defendant Action Construction Management, Inc. (hereinafter, “Action Construction”) moves pursuant to *CPLR* §3216 for an Order dismissing plaintiff’s complaint for failure to prosecute. While Defendant 42nd & 8th Holdco LLC (hereinafter, “42nd & 8th”) has filed an affirmation in support of Action Construction’s motion (NYSCEF Doc #73), plaintiff has cross-moved in opposition to Action Construction’s motion and for an Order extending his time to file the Note of Issue.

Plaintiff commenced this action on May 24, 2023, to recover for personal injuries allegedly sustained while he was performing construction work at defendants’ premises on November 10, 2022. After issue was joined by 42nd & 8th on September 22, 2023, and Action Construction on September 26, 2023, a Request for Judicial Intervention was filed on October 13, 2023, and a preliminary conference was held on March 11, 2024. Thereafter, plaintiff’s prior counsel, Subin Associates, LLP (hereinafter, “Subin”), filed an application via Order to Show Cause to be relieved as counsel on June 6, 2024 (NYSCEF Docs. #34-43). The Court granted this application on June 20, 2024, and the action was stayed for 45 days (NYSCEF Doc. #49). After the stay expired on or about August 5, 2024, Action Construction served plaintiff with a 90-day Notice pursuant to *CPLR* § 3216 on September 17, 2024 (hereinafter, “Notice”) (NYSCEF Doc. #69). Proof of delivery showed that plaintiff received the Notice at his Brooklyn address (NYSCEF Doc. #72). On October 14, 2024, plaintiff’s new counsel filed a Notice of Appearance (NYSCEF Doc. #65).

Action Construction argues that dismissal is warranted because it has fully complied with all procedural requirements under *CPLR* § 3216, including the timely service of the Notice after issue was joined and a preliminary conference order was issued. It further argues that despite plaintiff having received the Notice 157 days ago, he has failed to take any action, file a Note of Issue, or participate in discovery. Moreover, Action Construction argues that plaintiff cannot show a justifiable excuse nor a meritorious claim to survive dismissal because counsel’s appearance occurred over four months ago, giving him ample time to advance the case, and six of plaintiff’s treating providers have all been named in alleged ongoing Rico and/or fraud suits, which substantially bears on whether plaintiff has a good and meritorious cause of action.

In opposition, plaintiff argues that his failure to resume prosecution should be excused because the Notice was served on a Spanish-speaking *pro se* plaintiff and defendant failed to inform plaintiff’s new counsel of the Notice after his appearance was made in the action (*See* McDonald Worley’s Affirmation,

[*1]

NYSCEF Doc. #76, para. 28). Plaintiff further argues that, due to a large influx of cases his firm received following Subin's withdrawal from numerous cases, his failure to resume prosecution constituted a single non-willful event that should be excused as a law office failure (*Id.*, para. 26, 29, and 30).

In reply, Action Construction argues that there is no legal requirement for the Notice to be in a specific language; rather, the only requirement under *CPLR* § 3216(b) is that the notice contains the correct statutory language. Action Construction also argues that it was under no obligation to notify new counsel that the Notice had been served upon plaintiff, and instead it was plaintiff's responsibility to provide the Notice to his new attorney. Moreover, Action Construction argues that, pursuant to *Ting Chen, infra*, the "law office failure" excuse does not apply to high case volumes or busy calendars and therefore plaintiff cannot state a justifiable excuse. Finally, Action Construction argues that plaintiff's affidavit, lacking a translator's information and corroborating evidence, is insufficient to demonstrate a valid cause of action.

CPLR §3216 (a) states that “[w]here a party unreasonably neglects to proceed generally in an action or ... delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party’s pleadings on terms. Unless the order specifies otherwise, the dismissal is not on the merits.”

In turn, *CPLR* § 3216(b) states that “dismissal shall be directed under ...*subdivision (a)* [when] the following conditions precedent have been complied with:

- (1) Issue ...ha[s] been joined in the action;
- (2) One year ... ha[s] elapsed since the joinder of issue or six months ... have ... elapsed since the issuance of the preliminary court conference order ..., whichever is later;
- (3) The court or party seeking such relief ... shall have served a written demand by registered or certified mail requiring the party ... to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed ...”.

When a party fails to comply with a 90-day demand to serve and file a note of issue but demonstrates a ‘justifiable excuse for the delay and a good and meritorious cause of action’ (*CPLR* 3216 [e]), the trial court may not dismiss the action” (*Di Simone v. Good Samaritan Hosp.*, 100 N.Y.2d 632, 800 N.E.2d 1102, 768 N.Y.S.2d 735 [2003]). “The court has the discretion to accept law office failure as a justifiable excuse (*see CPLR* 2005), but law office failure does not constitute a justifiable excuse where there is a pattern of willful default and neglect, or where allegations of law office failure are conclusory, undetailed, and unsubstantiated (*Ting Chen v. Xiao Fang Shen*, 228 A.D.3d 798, 213 N.Y.S.3d 416 [2nd Dept. 2024]). Although a court retains “residual discretion to deny a motion to dismiss when [the] plaintiff tenders even an unjustifiable excuse, this discretion should be exercised sparingly to honor the balance struck by the generous statutory protections already built into *CPLR* 3216” (*Baczowski v. D.A. Collins Constr. Co.*, 89 N.Y.2d 499, 678 N.E.2d 460, 655 N.Y.S.2d 848 [1997]).

Here, the Court finds Action Construction has met the statutory requirements of *CPLR* § 3216(b). A year has passed since issue was joined by the defendants and six months have elapsed since the preliminary conference was held. In addition, a review of Action Construction's Notice shows that a demand was made upon plaintiff to “resume prosecution of the ... action, ... serve and file a Note of Issue

... within 90 days of service of th[e] demand ... [and] that default in complying with this demand will serve as the basis for a motion ... for dismissal for want of prosecution ...” (NYSCEF Doc. #69). Additionally, the record shows that plaintiff failed to comply with Action Construction’s demand within the 90-day period by not resuming prosecution of the action and filing the Note of Issue.

However, the Court finds also finds that plaintiff’s submissions demonstrate a justifiable excuse for law office failure. Specifically, plaintiff’s counsel’s assertion for law office failure consisting in having received a large influx of ex-Subin cases justifiably excuses his failure to prosecute this action. To substantiate his assertion, counsel outlines 16 Supreme Court cases where he submitted notices of appearances and/or moved to vacate the court’s dismissal of the action during the 90-day deadline allotted by Action Construction’s Notice¹ (*Id.* at pages 3-4, para. 19). After a cursory review of NYSCEF for these cases, the Court takes judicial notice that (1) these cases involved plaintiffs who were previously represented by Subin, (2) plaintiff’s counsel filed a notice of appearance and/or moved to vacate and/or restore the action to the respective Court’s calendar, and (3) these acts were performed by plaintiff’s counsel within the 90-day deadline allotted by Action Construction’s Notice in this action.

While Action Construction argues that *Ting Chen, supra*, stands for the proposition that law office failure “was not intended by the courts to encompass high case volume, busy calendars, or other like excuses,” this Court disagrees. In *Ting Chen*, the Appellate Division simply found that plaintiff’s assertions for law office failure were unsubstantiated because plaintiff failed to “provide ... further details or substantiation for [his] assertions.” Here, plaintiff’s counsel has provided the necessary details by outlining 16 Supreme Court cases that substantiate his assertions for law office failure, and therefore he has presented a justifiable excuse.

To establish a potentially meritorious claim, plaintiff’s counsel has submitted an affidavit by plaintiff. The affidavit is originally written in Spanish and is accompanied by an English translation. However, Action Construction challenges the admissibility of plaintiff’s affidavit arguing that it does not comply with *CPLR* § 2309 which mandates that a Certificate of Conformity accompany affirmations taken without the state, given that plaintiff’s affidavit was notarized in Texas. Action Construction also challenges the admissibility of plaintiff’s affidavit to the extent that it is unaccompanied by the requisite *CPLR* §

¹ See *Jordy Rene Granda v. Bayis Ne'Emon*, Index No. 529407/2023, Consent to Change Attorney filed on November 1, 2024 and Motion Seq. 7 seeking to vacate the court’s Order dismissing the action filed on February 20, 2025; *Clysmán Cedillo Suarez v. Aecom Tishman et al.*, Index No. 151654/2022, notice of appearance filed on December 9, 2024 and Motion Seq. 3 seeking to vacate the court’s order dismissing the action filed on April 3, 2025; *Celso Ortega v. New Amsterdam Restoration Corp., et al.*, Index No. 152414/2022, notice of appearance filed on November 7, 2024 and cross-motion in Motion Seq. 3 seeking to extend the time to file the Note of Issue and Certificate of Readiness filed on February 26, 2025; *Gabriel L. Pluas Garzon v. 886 Broadway LLC et al.*, Index No. 509927/2021, notice of appearance filed on December 6, 2024 and Motion Seq. 3 seeking an Order, *inter alia*, extending the time to file the Note of Issue and Certificate of Readiness filed on March 19, 2025; *Edwin LaBanda v. DeMartino Construction Company, et al.*, Index No. 509705/2022, where plaintiff’s counsel filed a notice of appearance on October 8, 2024; *Jorge Patricio Solorzano Calle v. Keap Street Holdings LLC, et al.*, Index No. 504612/2021, notice of appearance filed on September 18, 2024 and Motion Seq. 3 seeking an Order, *inter alia*, extending the time to file the Notice of Issue and Certificate of Readiness on February 20, 2025; *Carlos Jose Cabrera Taveras v. 299 3rd Development, LLC*, Index No. 501017/2023, notice of appearance filed on September 18, 2024; *Wilson Barrezueta v. A.A.D. Construction Corp, et al.*, Index No. 524072/2021, Motion Seq. 2 seeking an Order restoring the action to active status filed on October 16, 2024; *Cesar A. Torres-Florez v. Conrock Construction LLC et al.*, Index No. 816573/2022E, notice of appearance filed on November 6, 2024; *Wilmer Alejandro Morales Llivosaca v. 8200 Ocean Parkway Aprtnebt Corp., et al.*, Index No. 522751/2021, notice of appearance filed on September 25, 2024; *Dayana Herrera v. Twin Group Associates Inc., et al.*, Index No. 506935/2023, Consent to Change Attorney filed on October 25, 2024 and Motion Seq. 3 seeking, *inter alia*, to extend the time to file the Note of Issue and Certificate of Readiness filed on February 4, 2025; *Elin J. Oyuola-Delgado v. Twin Group Associates Inc., et al.*, Index No. 533224/2022, Consent to Change Attorney filed on November 1, 2024; *Jose Alba v. Gilbane Residential Construction, et al.*, Index No. 523063/2021, Consent to Change Attorney filed on January 23, 2025; *Edinson Javier Plasencia Sanchez v. Galaxy Developers LLC, et al.*, Index No. 513776/2023, Consent to Change Attorney filed on November 1, 2024; *Erika L. Ortiz Ramirez v. New Line Structures & Development LLC, et al.*, Index No. 520470/2021, Consent to Change Attorney filed November 15, 2024; and *Maria Gilces Orellana v. Verga Associates LLC*, Index No. 532716/2022, Consent to Change Attorney filed on October 21, 2024.

2101(b)'s translator's affidavit attesting to the accuracy of the translation and stating his qualifications (See Ryan Ganzenmuller's Affirmation, NYSCEF Doc. #80, pages 6-7). Here, Action Construction is correct in arguing that both defects make the affidavit inadmissible, however the Court notes the deficiencies are *de minimus* as the defects can be cured *nunc pro tunc*.

Moreover, as shown by the language of *CPLR §3216 (a)*, dismissal under this provision falls under the sound discretion of the Court and would not be on the merits in any case. Therefore, even assuming *arguendo* that this Court were to grant Action Construction's motion and dismiss plaintiff's action, the statute of limitations on plaintiff's claim has not expired and therefore plaintiff could simply refile his action. This would not serve the interests of judicial economy, especially considering that a review of this matter's record shows that plaintiff has resumed prosecution of this action by providing outstanding discovery as of March 14, 2025 (NYSCEF Docs. #81-84). Therefore, in the interest of judicial economy and in the exercise of this Court's discretion under *CPLR § 3216(a)*, Action Construction's motion is denied.

Accordingly, it is,

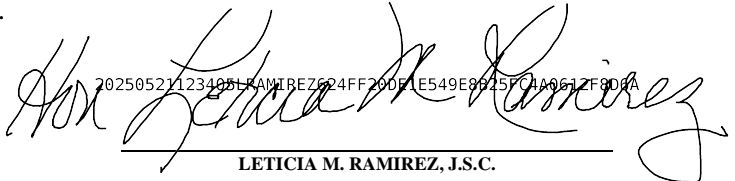
ORDERED: Defendants' motion pursuant to *CPLR §3216* for an Order dismissing plaintiff's complaint for failure to prosecute is denied in its entirety; it is further

ORDERED: Plaintiff's cross motion is granted to the extent that the time to file the Note of Issue is extended; and it is further

ORDERED: The parties shall appear for a Status Conference on July 16, 2025, at 9:30 am.

This constitutes the Decision and Order of this Court.

May 21, 2025
DATE


LETICIA M. RAMIREZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

[*4]